statistics in support, and by the quantity of the opium which, again, was not that large as to increase the gravity of the offence and thereby justifying the imposition of a stiff sentence. In the circumstances, therefore, I decided to alter the sentence of imprisonment to a fine. I accordingly allowed the appeal, set aside the sentence of one year's imprisonment and substituted a fine of $2,000 in default three months' imprisonment.

I trust that it may not be out of place here to quote some observations made by Professor T. T. B. Koh in a short but stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18th April, 1972, and which is reproduced in [1972] 1 M.L.J. lvii. On the question of sentences imposed by the courts Professor Koh had this to say: —

"In 1970, the courts exercising criminal jurisdiction in Singapore convicted 3,734 adult offenders of seizable offences. Of this number, 92.2% were fined, 4.7% were sent to prison, 2.7% were bound over or placed on probation and 0.4% were sent to the Reformative Training Centre. It will be immediately apparent that the percentage of convicted adult offenders who were sent to prison, i.e. 4.7% was relatively small. This is as it should be because sending a man to prison should be regarded as a last resort. I take this view for the following reasons. When a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life. There are unfortunately very few employers in Singapore who are enlightened enough to give discharged prisoners a fair opportunity of employment. The failure by the discharged prisoner to obtain employment and the hostility he confronts from society, very often leads him to feel alienated from society. In extreme cases, it could even lead a man to reject himself. When this happens, the chances of his rehabilitation are greatly reduced for a man must have respect for himself if he is to be successfully resocialized. Another objection to sending offenders to prison is that it disrupts their family life, their social relations and their employment. Another and perhaps graver objection is that most penal institutions have what is called an inmate sub-culture and the experience of imprisonment may, therefore, be corrupting to the offender who is in prison for the first time, rather than a means of his resocialization.

... I wish to argue in favour of the view that our courts should only send to prison a convicted man who has committed a grave crime against society and who has failed to respond to other non-custodial penal measures. In the case of a man convicted of offences which have not caused grave injury to person or damage to property, and who has not previously been sentenced to non-custodial penal measures, a sentence of imprisonment should never be imposed by the courts."

Professor Koh was, of course, speaking of conditions in Singapore but they are not very much different from those prevailing here. With respect, I associate myself fully with the humane views of the learned professor and his sense of compassion and decency in the approach to the problem of punishing first offenders. A first offender, be he on a drug charge or some other criminal charge, should be dealt with by the imposition of a fine or by placing him under bond or probation, but he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it is committed, or as a deterrent when the prevalence of a particular type of offence has truly reached a stage that a sentence of imprisonment alone may deter others from committing that type of offence.

Order accordingly.

Solicitors: *Stanley Ponniah, Ng & Soo.*

PAPPA v. SAMINATHAN

[O.C.J. (Mohamad Azmi J.) October 14, 1974]
[Kuala Lumpur — Civil Suit No. 269 of 1972]

Land Law — Whether registered title indefeasible — Fraud — Registration effected by insufficient or void instruction — Power of attorney — Substituted power of attorney — Attorney cannot delegate outside his power — Land Code (F.M.S. Cap. 138), s. 421 — National Land Code, s. 340.

In this case the lands were held under approved applications under the provisions of the F.M.S. Land Code, the registered occupier being one Palaniandy. In 1957 Palaniandy appointed the defendant his attorney in respect of his property including the said lands. About five years latter the defendant, acting as duly constituted attorney of Palaniandy, gave the plaintiff an irrevocable power of attorney purporting to authorise the plaintiff to transfer the said lands to herself. In 1965 Palaniandy was registered as the owner of the said lands under issued documents of title. In 1970 the said lands were transferred and registered in the plaintiff's name on the strength of the two powers of attorney and a statutory declaration. In the declaration the plaintiff declared that the defendant was in India. On the evidence, it appeared that it was understood between the parties that the plaintiff should only transfer the said lands to herself on the death of the defendant. The plaintiff alleged in the action that the defendant had trespassed on the property and she applied for a declaration that she was the registered owner of the said lands and for damages and injunction. Alternatively she claimed specific performance of a sale agreement between the defendant and herself. The defendant counterclaimed that his principal was still the proprietor of the said lands and that the plaintiff had transferred the said lands into her name fraudulently and by means of a void instrument.

Held: (1) in the circumstances of this case, the registration of the property in the plaintiff's name was obtained by fraud and misrepresentation. The plaintiff had falsely declared that the defendant was in India and had applied for the transfer of the said lands without the knowledge of the defendant and on the representation that the defendant desired the transfer to the plaintiff;

(2) although failure of consideration did not make the power of attorney to the plaintiff void, there was no provision in the original power of attorney for any authority on the part of the defendant to grant to a third person power to transfer the said lands and therefore the power of attorney purported to be given to the plaintiff in respect of the said lands was null and void;

(3) as the transfer and registration of the said lands by the plaintiff to herself was obtained by means of an insufficient or void instrument, the plaintiff's title to the said lands was not indefeasible;

(4) the plaintiff had failed to satisfy the court that the full purchase price of the said lands had been paid and in the circumstances this was not a proper case where the court should enforce the sale agreement;

(5) in the circumstances the court would make an order dismissing the plaintiff's claim and also a declaration that Palaniandy was the registered proprietor of the said lands and that the name of the plaintiff be expunged from the records of the relevant land office.

Cases referred to:-

(1) *Kho Kwang Choon* v. *Phuman Singh* [1965] 2 M.L.J. 189; [1968] 1 M.L.J. 183.

(2) *Hughes* v. *Seanor* (1869) W.R. 108.

(3) *Bryant, Powis and Bryant Limited* v. *La Banque du Peuple* [1893] A.C. 170.

Authorities cited but not referred to in the judgment: *Subramania Pillay* v. *Sundarammal* [1968] 1 M.L.J. 30, *Clark* v. *Malpas* 54 E.R. 1067, *Saroj Bandhu Bhaduri* v. *Sm. Jnanada Sundari Debya & Anor.* 36 C.W.N. 555, *Chin Tai* v. *Siow Shiow & Ors.* [1971] 1 M.L.J. 67, *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221, *Abdool Hoosein Zenail Agadin & Anor.* v. *Charles Agnew Turner* 14 I.A. 111, *Dharmaratna* v. *Dharmaratna* [1939] M.L.J. 310, *Assets Company Limited* v. *Mere Roihi*

[1905] A.C. 176 P.C., *A.L.N. Narayanan Chettyar & Anor.* v. *Official Assignee, High Court Rangoon & Anor.* A.I.R. 1941 P.C. 93.

CIVIL SUIT.

M. Segaram for the plaintiff.

Dulip Singh for the defendant.

Mohamed Azmi J.: This is a dispute in respect of ownership of land held under E.M.R. 5087 comprising of 2 acres 3 roods 35 poles of bendang Lot No. 10600 and one acre of kampong Lot No. 5406 in the Mukim of Tanjong Karang, in the District of Kuala Selangor. This type of land title commonly referred to as "tied-title" is prevalent in Tanjong Karang. The two lots (hereinafter referred to as "the said lands") were originally held under Approved Application Nos. 814/50 and 79/57 under the provisions of the repealed F.M.S. Land Code — the registered occupier being one Palaniandy s/o Muruan. In 1957 before leaving for India, Palaniandy appointed the defendant as his attorney in respect of his property in this country including the said lands vide a general power of attorney No. 500/75 dated May 11, 1957 (Exhibit AB2). About five years later, acting as a duly constituted attorney of Palaniandy, the defendant in turn gave the plaintiff an irrevocable Power of Attorney No. 739/62 dated July 9, 1962 (Exhibit AB9), purporting to authorize the plaintiff to transfer the said lands to herself. On July 15, 1965 Palaniandy was registered by the Land Office as the owner of the said lands under issued Document of Title E.M.R. 5089, and the extract was issued on December 2, 1966 (see Exhibit P8). On her own application, the said lands were transferred and registered in the plaintiff's name on July 9, 1970 on the strength of the two powers of attorney No. 500/57 and No. 739/62 together with a statutory declaration sworn on March 11, 1970. (See enclosure 16B in Exhibit P1).

From the Statement of Claim, it is alleged that since March 1970, *i.e.* some four months prior to the said lands being registered in the plaintiff's name, the defendant has trespassed into the property and has been cultivating padi thereon and is wrongfully in possession thereof. The plaintiff prays for a declaration that she is the registered owner of the said lands; for an injunction to restrain the defendant from interfering with her rights; for vacant possession; damages for trespass and other ancillary reliefs. In the event of the court declaring the irrevocable Power of Attorney No. 739/62 to be void and consequently the transfer of the land by the plaintiff as donee of the power to herself is also void, she prays for an order for specific performance based on the sale agreement dated August 10, 1967 (Exhibit P2) so that the defendant should execute a fresh and valid registrable memorandum of transfer of the said lands to the plaintiff, and failing which, the Senior Assistant Registrar, High Court, be empowered to execute the said transfer on behalf of the defendant or on behalf of Palaniandy, the registered proprietor of the said lands. In his defence, the defendant maintains that he is still the beneficial attorney and proprietor of the said lands. He refers to certain transaction between him and the plaintiff, in which he permitted the plaintiff to cultivate a portion of the said lands subject to certain terms and conditions. It is averred that the plaintiff was in breach of the said terms and conditions by failing to pay a sum of $2,300 on or before October 31, 1967 despite repeated demands. In the alternative, he avers that the sale agreement with the plaintiff was illegal. By reason thereof, he admitted entering into occupation of the said lands and cultivating them. He further avers that without his knowledge the plaintiff applied for and obtained permission from the appropriate authority to transfer the said lands into her name, and that on July 9, 1970 the plaintiff had fraudulently transferred the said lands into her name by virtue of the two powers of attorney. It is further averred that the transfer into the plaintiff's name was fraudulent and *void ab initio* as the 1962 irrevocable Power of Attorney was at all material times invalid, null and void and of no effect due to want or failure of consideration, or alternatively due to the unlawful and excess use of the aforesaid power. Two particulars of fraud were pleaded to have been exercised by the plaintiff on the defendant. Firstly, it is alleged that the plaintiff applied for the transfer of the said lands without the knowledge of the defendant, and secondly, the plaintiff misrepresented to the Collector of Land Revenue that the defendant desired the transfer to the plaintiff. By virtue of the application for transfer and the transfer being invalid and void in law, the defendant avers that the plaintiff does not have an indefeasible title to the said lands. He accordingly counterclaims against the plaintiff for a declaration that the 1962 irrevocable power appointing the plaintiff as his attorney to be declared null and void; for declaration that Palaniandy, the defendant's principal, has been and still is the registered proprietor and owner of the said lands; for injunction and other ancillary reliefs. In her Reply, the plaintiff denies the counterclaim. She denies the alleged fraud or that there was want or failure of consideration, or the plaintiff's transfer of the land by virtue of the 1962 irrevocable power was unlawful or in excess use of that power. The plaintiff also alleges that on August 10, 1967 the defendant agreed with her to sell the said lands for $7,500 and it was agreed, *inter alia*, that as from that date the defendant should give vacant possession and would cease to exercise any rights on the property. On the same date, she paid $3,200 to the defendant and one Gopal @ Kobale, a tenant of the said lands, paid $2,000. Subsequently, the plaintiff paid and settled the balance of $2,300. In short, the plaintiff's claim is for a declaration, injunction, vacant possession and damages for trespass. Alternatively, if the court finds the 1962 irrevocable power of attorney is void, she claims for specific performance of the sale agreement dated August 10, 1967 (Exhibit P2).

Having regard to the nature of this case, in my view, the first issue to be determined is whether or not the plaintiff's title is indefeasible. Illegality as distinct from fraud is not sufficient to defeat the plaintiff's title in the said lands. (See *Kho Kwang Choon* v. *Phuman Singh*[1]). Section 42 of the repealed F.M.S. Land Code (Cap. 138) provides:

"(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void."

Section 42 is the forerunner of the present section 340 of the National Land Code, the relevant part of which provides:

"(1) The title or interest of any person or body for the time being registered as proprietor of any land, . . . shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any persons or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser."

On the issue of fraud and misrepresentation, the evidence disclosed that on January 6, 1967 the defendant made an application to the Collector of Land Revenue Kuala Selangor to transfer the said lands from Palaniandy to himself, and in support of the said application he forwarded the general Power of Attorney No. 500/57 executed by Palaniandy in his favour, together with a statutory declaration to the effect that Palaniandy is still alive. On August 28, 1967, *i.e.* about seven months later, the plaintiff made a similar application to transfer the same property to herself on the strength of the aforesaid 1957 general power, by which the defendant was duly constituted as attorney of Palaniandy, and the 1962 irrevocable power executed by the defendant in favour of the plaintiff. The position by the end of August 1967 as far as the Kuala Selangor Land Office is concerned, was that there were two conflicting or rival applications for the transfer of Palaniandy's lands — one by the defendant and the other by the plaintiff. From the evidence of Encik Hassan bin Mohamed Ali, the Assistant Collector of Land Revenue Kuala Selangor, the earlier application for transfer by the defendant was rejected by the Commissioner of Lands and Mines on May 15, 1970, and the subsequent application of the plaintiff was approved in July the same year. It is not seriously in dispute that the decision in favour of the plaintiff was made on the strength of both powers of attorney after it had been ascertained from the Kuala Lumpur High Court Registry that they were still effective, and also on the strength of the plaintiff's statutory declaration to the effect that both Palaniandy and the defendant were still living and that they were in India at the material time. On the evidence, it is my finding that the defendant has established fraud and misrepresentation on the part of the plaintiff as envisaged by section 340(2)(a) of the National Land Code. That part of the statutory declaration which declared that the defendant was still living and was in India is obviously untrue and fraudulent. It can reasonably be inferred that the Collector, the Commissioner of Lands and Mines and as well as the State Executive Council must have been misled into thinking that both Palaniandy and the defendant agreed to the transfer and were no longer interested in the said lands, and that there was no necessity to inform any of them. (See Memorandum to Exco in enclosure 21 in Exhibit P1). In my view, this explains why the defendant was never informed regarding the rejection of his application for transfer nor the approval of the plaintiff's application. Having regard to the evidence of the Assistant Collector of Land Revenue and the memorandum dated June 5, 1970 prepared for the State Executive Council for the purpose of obtaining the consent of transfer of the said lands, I am satisfied that the registration of the property in the plaintiff's name was obtained by means of fraud and misrepresentation. There is nothing in the memorandum to say that the said lands were sold to the plaintiff, but as stated by the Assistant Collector, the transfer was made by the plaintiff as attorney to her own self on the strength of the two powers and also on the strength that the defendant was supposed to have gone back to India. In the circumstances of this case, I find the plaintiff has applied for the transfer of the said lands without the knowledge of the defendant and that the plaintiff misrepresented to the Collector that the defendant desired the transfer to the plaintiff. Further, I do not accept the plaintiff's contention that the defendant gave her the 1962 irrevocable power solely because he had in mind to sell the said lands to her. Her story is not supported by Mr. Chelvanayagam the solicitor who prepared the power of attorney; nor by the defendant's brother, Poongian @ Poonga (DW3), who is also treated as a real "brother" by the plaintiff. In my view, the defendant's version as to the circumstances under which the power was given is more probable.

The 1962 power literally allows the plaintiff to transfer the said lands to herself as a gift — the consideration for the power being for love and affection and the sum of $10.00 — although the plaintiff admits that the said sum of $10 was never in fact paid to the defendant. In my opinion, the story of the defendant shows how the "love and affection" had arisen. I accept the fact that the power was given on the understanding that the plaintiff would look after the defendant who was then seriously ill and also to look after his wife who was then going blind. Further, according to Mr. Chelvanayagam, whose evidence I accept, it was understood by the parties that the plaintiff should only transfer the said lands to herself on the death of the defendant.

In cross-examination, the plaintiff originally alleged that the defendant agreed to sell the said lands in 1962 and the discussion on the sale transaction took place before they left Batang Berjuntai for Mr. Chelvanayagam's office for the purpose of executing

the power of attorney. But, later, she testified that it was only five or six months after the execution of the document that she agreed to buy the said lands for $4,000. If there was such an agreement and the sole purpose of granting the power was to sell the said lands to her, it is odd that the plaintiff did nothing about it till August 10, 1967 when the sale agreement (Exhibit P2) was executed. What happened between the granting of the power to the plaintiff (July 9, 1962) and the date of sale agreement (August 10, 1967) is very relevant. In this connection, I accept Mr. Chelvanayagam's evidence that the power was granted in contemplation of the defendant's death, and it was understood by the parties that the plaintiff could only transfer the said lands to her own name on the death of the defendant. He could not advise the defendant to make a will because the property was still under Approved Applications. This neatly explained why nothing was done by the plaintiff for nearly five-and-a-half years after the power was granted. On the contrary, during this period, the defendant executed three tenancy agreements in respect of the said lands with Gopal — a cousin of the plaintiff. The third tenancy agreement was executed on June 21, 1967 (Exhibit P5). The total period of lease extended for five years commencing from April 30, 1967 to April 30, 1972. The right of the defendant to lease the said lands despite the existence of the irrevocable power of attorney was never challenged by the plaintiff at the material time. It can reasonably be inferred that the plaintiff knew all along that the power was given to her not for the purpose of selling the property to her; and, as such, there was fraud and misrepresentation on the part of the plaintiff when she applied for the transfer of the said lands to herself on the strength of the said power. She very well knew that it was never intended for that purpose. The fact that the plaintiff's name was endorsed as the lessor from August 10, 1967 on the reverse of the three tenancy agreements (Exhibits P3, P4 and P5) does not alter the fact that the irrevocable power was never intended to be used for transferring the said lands by the plaintiff as attorney to herself in her personal capacity. Gopal cultivated the said lands up to the end of April 1972 as agreed in the third tenancy agreement, and it was only after the expiry of this tenancy the defendant entered into occupation of the said lands up to now. In any event, the said endorsements were only executed by the plaintiff and, as such, they are not legally binding on the defendant. Having regard to the evidence as a whole, I find fraud and misrepresentation on the part of the plaintiff have been proved beyond reasonable doubt.

Under paragraph 7B of the Amended Statement of Defence, apart from alleging fraud, the defendant avers that the transfer of the said lands into the name of the plaintiff was *void ab initio* on the ground that the 1962 irrevocable power at all material times was invalid, null and void and of no effect due to want or failure of consideration or, alternatively, due to the unlawful and excess use of the power. On the issue of want or failure of consideration, learned counsel for the plaintiff concedes that the irrevocable 1962 power given to the plaintiff by the defendant does not show consideration, but he argues that under section 138 of our Contracts Act, 1950 no consideration is necessary to create an agency and, as such, failure of consideration does not make the power void. With respect, I agree with that argument. In my view, English cases on enforcement of equity like *Hughes* v. *Seanor*[2] although affirmed on appeal, has no relevance in this case. However, on the issue of unlawful and excess use of power, it is my finding that the 1962 irrevocable power cannot confer the plaintiff as attorney of the defendant with the authority to transfer property belonging to Palaniandy. The 1957 power given by Palaniandy to the defendant being a revocable and general power, does not entitle the defendant to confer to the plaintiff an irrevocable power of attorney in respect of the said lands. The defendant is, of course, empowered to transfer the said lands, but he has no authority to delegate that power unless such authority is either expressly or impliedly given. No authority need be cited for the proposition that an agent or attorney cannot give to a third person a greater power than what has been conferred to him by his principal. Powers of attorney should be construed strictly. Thus, in *Bryant, Powis, and Bryant, Limited* v. *La Banque Du Peuple*[3] Lord Macnaghten said at page 177:

> "... that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

In short, the defendant cannot delegate a power which is outside the power of attorney No. 500/57. From the contents of this power, I find no provision either express or otherwise for any authority on the part of the defendant to grant to a third person to transfer the said lands, and as such the power purported to be given to the plaintiff in respect of the said lands is null and void, even if the discrepancy in the particulars of the Approved Applications in the two powers could be ignored as a mere typographical error. On the facts and the law, I find the defendant's act in conferring the irrevocable power to the plaintiff is in excess of the power given to him by Palaniandy, and it would therefore follow that the transfer and registration of Palaniandy's lands by the plaintiff to herself on the strength of the two powers was obtained by means of an insufficient or void instrument as envisaged under section 340(2)(b) of the National Land Code, and, as such, the plaintiff's title to the said lands is not indefeasible. In the event, I hold that the 1962 irrevocable power is not valid and effective to convey the said lands to the plaintiff. It is my finding that the transfer of the said lands by the plaintiff into her own name was *void ab initio* on the ground that the 1962 irrevocable power at all material times was invalid, null and void and of no effect as far as the said lands are concerned due to unlawful and excess use of the original power given by Palaniandy.

On the alternative claim of the plaintiff that there was a sale of the said lands, it is the story of the plaintiff that on August 10, 1967 the defendant executed an agreement to sell the said lands for $7,500 in the presence of a petition writer, Siva Rajan (PW2). It is suggested that the intention to sell existed as early as 1962 when the defendant gave her the irrevocable power of attorney in order to enable her to transfer

the said lands which were then under Approved Applications to herself. The alleged sale is supposed to be supported by the so-called receipt Exhibit P7 dated January 25, 1968, in which the defendant acknowledged the said sale. Although the defendant admits putting his thumb impression on the alleged agreement, he being illiterate and of old age says that it was not explained to him that it was a sale agreement. The reason for granting the 1962 irrevocable power has already been dealt with and, as such, I do not propose to deal again with this aspect of the plaintiff's story. I need only add that her allegation that the defendant intended to sell the said lands to her as early as 1962 for the sum of $4,000 should be rejected. On this particular issue, the evidence of the defendant as materially corroborated by Mr. Chelvanayagam is clear enough and should be accepted as more probable. On the sale agreement, it is the plaintiff's contention that she entered into the transaction with the defendant in which the defendant agreed to sell the said lands at the purchase price of $7,500. The agreement is on the following terms and conditions:

"(1) The purchaser will pay the seller the sum of dollars Five Thousand Two hundred only ($5,200/-) on this day of signing this agreement and the balance of dollars Two Thousand and Three hundred only ($2.300/-) during or before 31st day of October, 1967.

(2) The above amount includes dollars Two Thousand (2,000/-) due to Gopal of Parit 4, Sungei Burong, Sekinchan, Selangor by way of monies received under leases by the seller and for which from this day the purchaser will be responsible for.

(3) The purchaser will do the needful acts to obtain the grants of the aforesaid A/As vide the powers vested in her under Irrevocable Power of Attorney executed in favour of the purchaser by the seller. The Power of Attorney reference is Kuala Lumpur Supreme Court Reg. No. 739 of 1962 of 1.8.1962.

(4) The seller from this day will cease to exercise any rights relating to the aforesaid A/As"

The plaintiff testifies that she has settled all the purchase price as stipulated in the agreement, and the final payment of $2,300 under condition (1) was made in two instalments of $600 and $1,700 vide Exhibits P6 and P7 respectively, and, as such, it is argued that even if the court finds the 1962 irrevocable power to be void rendering the transfer of the said lands by the plaintiff as donee of the power to herself also void, the alleged sale should be enforced. The defendant, however, says that he did not realise that the document he had executed on August 10, 1967 was a sale agreement. He denies receiving $3,200 in cash as part of the purchase price on that date, and he also denies receiving $1,700 on January 25, 1968 as final payment of the purchase price. He avers that he was deceived into executing Exhibit P7, which is supposed to be the acknowledgment for the receipt of the sum of $1,700. On the issue of whether the said lands have in fact been sold by the defendant, the plaintiff is principally relying on the 1967 sale agreement (Exhibit P2). She also relies on the so-called receipt for $1,700 (Exhibit P7) and the endorsement on the reverse of the three tenancy agreements dated November 29, 1966 (Exhibit P3) January 3, 1967 (Exhibit P4), and June 21, 1967 (Exhibit P5), under which the defendant leased the said lands for a total period of five years to a cousin of the plaintiff named Gopal @ Kobale (PW5) commencing from April 30, 1967 till April 30, 1972. On the 1967 agreement itself, it is not in dispute that the defendant did execute the document. The fact that the defendant has agreed to sell the said lands is supported by Siva Rajan, the Petition Writer, who prepared the document. Neither fraud nor undue influence has been pleaded by the defendant as far as the sale agreement is concerned. Further, paragraph 4 of the Statement of Defence wherein the defendant avers that the plaintiff "acted in breach of the terms and conditions in that, *inter alia*, a sum of $2,300 due to be paid to the defendant on or before 30th day of October 1967 was not paid by the plaintiff to the defendant", must in all probabilities refers to condition (1) of the said agreement. From the pleadings and the evidence, it is reasonable to infer that the defendant knew the document he executed in 1967 was in respect of sale of the said lands. In my view, the only issue as far as the sale of the said lands is concerned is whether the plaintiff has settled the agreed purchase price of $7,500 and complied with all the terms and conditions of the agreement. On the question of the payment of the purchase price, I find there are material discrepancies between the evidence of the plaintiff and her witnesses and as well as between the evidence adduced by the plaintiff and the pleadings. Thus, in her Reply to the defendant's counterclaim, it is alleged that the agreement to sell was made on August 10, 1967, and as regards the purchase price of $7,500 it is pleaded that she paid a sum of $3,200 and Gopal the lessee of the said lands paid $2,000, and that subsequently she paid and settled the balance of $2,300. In her evidence, the plaintiff explained that the $2,000 mentioned in the sale agreement was owing to her from Gopal for money which Gopal had borrowed from her. However, according to the Petition Writer, Mr. Siva Rajan (PW2), it was a deduction made in respect of advanced rentals received by the defendant from Gopal in respect of the third tenancy agreement. Whatever it may be, the defendant denies the allegation that what Gopal gave him by way of advanced rents for the five-year lease was to be deducted from the purchase price of $7,500. On the evidence, it is my finding that even if there was a deduction as alleged, the amount that could have been deducted could not possibly be $2,000. Firstly, the plaintiff alleges that the total rents were $1,700 under the three tenancy agreements (Exhibits P3, P4 and P5), whilst the defendant says that they were only $1,650. There is thus a difference of $50. However, even if the plaintiff's figure is accepted, there is no reason why the whole amount of $1,700 should be deducted since the defendant should at least be entitled to that part of the rent between April 30, 1967 (date of commencement of first tenancy agreement) and August 10, 1967 (date of alleged sale). Secondly, it is the plaintiff's story that the $2,000 deduction from the purchase price was made up of $1,700 of advanced rents paid by Gopal to the defendant, and the balance of $300 was a loan given by Gopal to the defendant after the third tenancy agreement was executed in consideration of the defendant giving him an extension of period of lease. Gopal, who was a lessee of the said lands, is not a party to the sale agreement and, although he is related to the plaintiff, there is no reason why his alleged loan of $300 should be included in the purchase price of the said lands. I find the story about the loan most

improbable, particularly having regard to the fact that it was not even mentioned in Gopal's letter dated March 6, 1970 to the defendant's solicitor in reply to the defendant's notice requesting him to vacate the said lands. (See Exhibit P12). I therefore reject the plaintiff's story that she has paid $2,000 by way of deduction towards the full purchase price of the said lands as envisaged in condition (2) of the sale agreement.

As regards the balance of $2,300, the plaintiff testifies that it was paid as follows — $600 on October 5, 1967 and $1,700 on January 25, 1968. She further alleges that it was after these payments that she applied to the Collector for transfer. This cannot be so as the evidence is so clear that she applied for transfer to the Land Office as early as August 28, 1967, *i.e.* before the alleged final payment of $1,700. Further, according to the plaintiff, the sum of $600 was receipted by Exhibit P6 and the remaining $1,700 was paid in cash on the date Exhibit P7 was executed. It is alleged that Exhibit P7 is the receipt for the second final payment. However, on perusal of this document, I find Exhibit P7 is not a receipt for any sum. In fact, it is an I.O.U. chit for $7,500, although the plaintiff in her evidence testifies that she does not know about this. On the reverse of the document, I find there is some sort of an undertaking by the defendant to repay an unspecified sum including interest to the plaintiff with the defendant's grandson, Muniandy, standing as a guarantor. There is no mention on either side of this document of $1,700 or any payment made by the plaintiff to the defendant. Thus, on proof of the various alleged payments towards the purchase price, the plaintiff is relying on oral testimony except for the payment of $600 which was receipted by Exhibit P6. I cannot believe that the petition writer who is alleged to have witnessed the payment of $3,200 on August 10, 1967 would allow the plaintiff to do so without any receipt. It should be noted that the payment of $600 was also made in the presence of the same petition writer and the receipt was issued in that particular case. Nor can I accept that an experienced Land Office Clerk (PW4) before whom the alleged final payment of $1,700 was made on January 25, 1968 would allow it to take place without mentioning it in Exhibit P7 or noting it down somewhere. The explanation by PW4 that he had made an error by omitting the same from Exhibit P7 sounds entirely hollow. As stated earlier on, there is nothing in Exhibit P7 to show that it is a receipt for the alleged payment of $1,700. Since a comparatively small payment of $600 is receipted, it would be more probable that larger payments of $3,200 and $1,700 be acknowledged in writing. On the balance of probabilities, apart from the payment of $600, I find the plaintiff has failed to establish the other payments towards the purchase price. However, even if it is accepted that the plaintiff has settled the whole of the agreed purchase price, it is obvious on the evidence that she has committed a breach of the agreement, and thereby does not justify the court to grant specific performance of the sale agreement. Under the terms of the sale agreement, the balance sum of $2,300 should be paid on or before October 31, 1967. It is conceded by learned counsel for the plaintiff that of the balance due only the sum of $600 was paid by that date. Under the circumstances, the plaintiff has committed a breach of condition (1) of the sale agreement, and by applying to the Land Office for the transfer of the said lands in August 1967 the plaintiff was clearly acting fraudulently, as by that date she had not yet settled the full purchase price. For these reasons, and as well as the fact that the plaintiff has failed to satisfy me that the full purchase price of the said lands has been paid, I do not think that this is a proper case where the court should enforce the sale agreement. In the event, the plaintiff's claim in the alternative should also be dismissed.

I would therefore dismiss the plaintiff's claim with costs. On the evidence before me, I also find the defendant's counterclaim has been established. I accordingly allow the counterclaim in the following terms: —

(1) a declaration that the defendant's principal, Palaniandy, has been and still is the proprietor and registered owner of the land held under E.M.R. 5809 in the Mukim of Tanjong Karang, in the District of Kuala Selangor, formerly known as Approved Application Nos. 814/50 and 79/57;

(2) a declaration that the irrevocable power of attorney dated July 9, 1962 and registered in the High Court at Kuala Lumpur vide Registration No. 739/62 be declared null and void as far as it affects the lands mentioned in (1);

(3) an injunction restraining the plaintiff or her agents or servants or any person or persons claiming by or through her from interfering with the rights of the defendant over the said lands in his capacity as attorney for Palaniandy;

(4) an order that the assignment or memorandum of transfer or other application drawn and/or executed by the plaintiff in respect of the said lands be set aside;

(5) a consequential order that the appropriate authority do expunge the name of the plaintiff from the records of the relevant Land Office;

(6) costs of the counterclaim.

I also order that all monies (if any) paid into Court vide Order of Court dated October 30, 1972 be paid out to the defendant.

Order accordingly.

Solicitors: *Segaram & Co.; Dulip Singh & Co.*